# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 865

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL–CIO, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–7a) is reported at 263 F. 2d 796. Its supplemental opinion, partially denying petitioner's motion for a stay of judgment pending application for certiorari (Pet. 8a–9a), is not yet officially reported. The decision and order of the Board (R. 18–53)[1] are reported at 119 N.L.R.B. 307.

### JURISDICTION

The judgment of the court of appeals was entered on March 10, 1959 (Pet. 10a–13a). A petition for rehearing was denied on February 26, 1959. The peti-

[1] "R" references are to the transcript of record printed in the court below.

tion for a writ of certiorari was filed on April 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, under Section 10(e) of the National Labor Relations Act, which provides that "No objection that has not been urged before the Board * * * shall be considered by the court," a court of appeals may decline to review an issue which, though passed on by the Board, was not contested before it by the respondent.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix.

## STATEMENT

The Board's trial examiner found that petitioner Union, though it had lost a Board-conducted election by a vote of 6 to 0, nevertheless continued to picket the premises of the Alloy Manufacturing Company for the objectives of forcing Alloy to recognize it as the employees' exclusive bargaining agent and to grant it a contract which required employees to become union members. The examiner further found that the Union also sought to attain those objectives by placing Alloy's name on a "We Do Not Patronize" list, which was printed in a union newspaper, and by appeals to Alloy's customers not to buy its products. (R. 36–40.) The examiner concluded that, insofar as the picketing sought to compel recognition, it tended to restrain

Alloy's employees in their choice of a representative and was thus violative of Section 8(b)(1)(A) of the Act and that, insofar as it sought a union shop contract, it was an attempt to cause Alloy's employees to be discriminated against for their lack of union membership and was thus barred by Section 8(b)(2). (R. 41–43.) The examiner, however, found no violation of the Act with respect to the Union's use of the "We Do Not Patronize" list and its customer appeals, on the ground that these activities were noncoercive and thus protected by Section 8(c) (R. 44–47). He accordingly recommended that an appropriate remedial order be entered respecting the picketing, and that the complaint be dismissed respecting the "We Do Not Patronize" list and the customer appeals (R. 46–49).

The Union filed no exceptions with the Board from the trial examiner's findings and conclusions. The charging party, Alloy, excepted to his failure to find a violation with respect to the "We Do Not Patronize" list and the customer appeals (R. 15–17).

The Board affirmed the trial examiner's decision with respect to the picketing. The Board noted that the Union had filed no exceptions. It added that: (1) the trial examiner's conclusion that minority picketing for recognition was violative of Section 8(b)(1)(A) comported with the Board's recent decision in *Curtis Brothers,* 119 N.L.R.B. 232 (which is before this Court in No. 717); and (2) the logic of *Curtis* compelled the conclusion that, insofar as the picketing sought in addition a union shop, it was not only viola-

tive of Section 8(b)(2), but also of Section 8(b)(1)(A) (R. 19–20).

The Board then went on to hold, overruling the trial examiner, that the use of the "We Do Not Patronize" list and the customer appeals, in furtherance of the recognition and union-shop objectives, was likewise violative of the Act. For, as the Board pointed out (R. 22): "* * * appeals to consumers and 'we do not patronize' lists contain the same threats to the employees' livelihood as does picketing."

The court of appeals enforced the Board's order insofar as it prohibited the Union from picketing to compel recognition and a union shop. Since the Union conceded that its picketing for a union shop was violative of Section 8(b)(2), the portion of the order barring such picketing was sustained on that ground. The portion of the order barring picketing for recognition was sustained on the ground that, as the Union had failed to except to the trial examiner's finding that such picketing was violative of Section 8(b)(1)(A), Section 10(e) foreclosed court consideration of that question. (Pet. 3a–5a.)

The court, however, declined to enforce the remaining portion of the Board's order, barring the use of the "We Do Not Patronize" list and the customer appeals. In agreement with the trial examiner, the Court concluded that this activity was protected by Section 8(c). (Pet. 5a–7a.)

## ARGUMENT

The first question which petitioner seeks to present (Pet. 2)—whether Section 8(b)(1)(A) of the Act

prohibits peaceful picketing by a minority union to compel recognition as the employees' exclusive bargaining agent—is the same question that is presented in No. 177, certiorari granted April 20, 1959 (the *Curtis* case). That question, however, was not reached by the court below because of its view that, since the Union had failed before the Board to contest the trial examiner's findings on the picketing, Section 10(e) warranted the court in declining to review the picketing question. Thus, the primary question which petitioner asks this Court to review was not considered or decided by the court below. If, as we believe to be clear, the action of the court below in declining to review that question does not present any grounds for certiorari, this Court would likewise have no basis for reaching the merits of the picketing issue. Nor would the Court have occasion to consider other questions here, for the Board has decided not to seek certiorari in the instant case with respect to the court of appeals' holding on the "We Do Not Patronize" list and the customer appeals.

The situation here, where the Board has elected to affirm on substantive grounds the trial examiner's findings even though no exceptions have been filed by the party aggrieved, is an unusual one. Section 10(c) of the Act provides that, if no exceptions to a trial examiner's report are filed within twenty days, his "recommended order shall become the order of the Board." Pursuant to this provision, the Board automatically adopts the trial examiner's order as its own and obtains summary enforcement thereof, where no exceptions at all have been filed to his intermediate

report.[2] Moreover, where, as here, exceptions have been filed to only a part of the trial examiner's findings, the Board ordinarily will not consider those to which no exceptions were filed, affirming them simply because of the absence of exceptions.[3] In these circumstances, the problem which confronted the court below—*i.e.*, whether Section 10(e) empowers a court to decline to consider an issue where no exceptions have been filed respecting it but the Board has nevertheless considered and affirmed the trial examiner's holding—is not likely to arise often, and its resolution has no intrinsic or general importance in the administration of the Act. For this reason alone, the petition should be denied.

Moreover, the court's application of Section 10(e) was a permissible one and within its powers under the Act. Where, as here, the issue has not been contested before the Board, the Board has not had the benefit of full argument of the issues by the parties, and the reviewing court, in turn, does not have the benefit of the Board's informed judgment on the contentions advanced for the first time on appeal. See *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 256; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37; *Federal Power Com-*

[2] See *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172 (C.A. 9); *National Labor Relations Board* v. *Pugh & Barr, Inc.*, 194 F. 2d 217 (C.A. 4).

[3] The cases cited by petitioner (Pet. 11, n. 2) present the unusual situation where the trial examiner's findings or recommendations were, in the Board's view, clearly erroneous; in this situation, the Board may modify or set aside the finding even though there has been no specific exception thereto.

*mission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501. In these circumstances, a court of appeals is justified in declining to review a portion of an order to which the party adversely affected filed no exceptions and which would, therefore, automatically have become final but for exceptions filed to other parts of the order by another party.[4]

[4] There is no merit to petitioner's contention (Pet. 14) that, even if Section 10(e) were applicable here, it would not have foreclosed judicial review under the exception recognized in *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388—*i.e.*, the court need not enforce a Board order, even absent exceptions, "if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce." The Board's holding that Section 8(b)(1)(A) bars minority picketing for recognition is supported by substantial considerations (see Pet. No. 717, pp. 9–14). Consequently, even if the Board were ultimately reversed, it cannot be said that it "has patently traveled outside the orbit of its authority." In short, the exception envisaged by *Cheney* is not the situation where the agency arrives at a colorable conclusion which is later found to be erroneous, but rather one where it is clear that the agency exceeded its jurisdiction or has no basis whatever for its action. This interpretation is confirmed by *Tucker*, *supra*, where this Court held that even such a substantial defect as appointing a hearing examiner who did not satisfy the requirements of the Administrative Procedure Act was not enough to deprive "the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." (344 U.S. at 38).

Nor can petitioner derive support from *Phillips* v. *Securities and Exchange Commission*, 156 F. 2d 606 (C.A. 2); *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A. D.C.); and *Hormel* v. *Helvering*, 312 U.S. 552 (Pet. 13, 16–17). The issue in *Phillips* was whether a stockholder had reasonable grounds for failing to object to a reorganization plan, when the SEC undertook on its own to examine the plan; the case simply holds that, since the stockholder could have assumed that the

## CONCLUSION

The procedural question on which the decision below was based—the only question properly urged as a reason for granting the writ—turns on the unusual circumstances of this case and is not of general importance. There is no conflict of decisions and the decision below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
*Solicitor General.*

JEROME D. FENTON,
*General Counsel,*
THOMAS J. MCDERMOTT,
*Associate General Counsel,*
DOMINICK L. MANOLI,
*Assistant General Counsel,*
NORTON J. COME,
*Deputy Assistant General Counsel,*
*National Labor Relations Board.*

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Commission would have decided the issue in a favorable way, his initial failure to object did not bar him from contesting the Commission's subsequent adverse decision. In the *City of Pittsburgh* case, the court found that the question had in fact been timely raised in a petition for rehearing (237 F. 2d at 749). In *Hormel*, between the time the case was decided by the Board of Tax Appeals and its review in the court of appeals, this Court, in another case, had indicated the existence of a new basis for tax liability; in these special circumstances, it was held that the court of appeals could properly give consideration to the new decision even though it had not been considered below.

## APPENDIX

The National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) provides:

Sec. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

Sec. 10. * * * (c) * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the

proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any United States court of appeals (including the United States Court of Appeals for the District of Columbia) or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the United States District Court for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member,

agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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